NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 17-1098/1159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner/Cross-Respondent,	)	
	)	
v.	)	ON APPEAL FOR
	)	ENFORCEMENT OF AN ORDER
SPECTRUM JUVENILE JUSTICE SERVICES,	)	OF THE NATIONAL LABOR
	)	RELATIONS BOARD
Respondent/Cross-Petitioner.	)	
	)	

O R D E R

Before: KEITH, COOK, and THAPAR, Circuit Judges.

The National Labor Relations Board (the Board) petitions for enforcement of an order in which it found Spectrum Juvenile Justice Services (Spectrum) in violation of § 8(a)(5) & (1) of the National Labor Relations Act (the Act). (Codified at 29 U.S.C. § 158(a)(5) & (1)). Spectrum cross-petitions for review from that order. The parties have not requested oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Spectrum operates two maximum security juvenile detention centers in Highland Park, Michigan—the Calumet facility and the Lincoln facility. In March 2016, a secret ballot election was held at these two facilities where Spectrum's security officers voted in favor of representation by the International Union, Security, Police and Fire Professionals of America (the Union).

Spectrum filed an objection to the conduct of the election. It stated that, before the election, the Board's agents divided the list of eligible voters provided by Spectrum into two lists—one containing the Calumet facility voters; the other, the Lincoln facility voters. However,

the Board mistakenly omitted thirty-five eligible voters from these two lists. Consequently, Board agents challenged the ballots of these thirty-five voters during the election. Ultimately, it was agreed that the challenged voters were, in fact, eligible voters. Upon counting the challenged ballots with the others, seventy-four employees voted in favor of union representation, fifty-six were opposed.

Spectrum alleged that it was "entirely probable" that some of the thirty-five voters "believed that [Spectrum] purposely left them off the List, and as a result, voted for the Union based on this apparent snub." Spectrum contended that if only "nine of [the thirty-five] voters had changed their votes, the Union would have lost the election."

The Regional Director overruled Spectrum's objection and certified the Union as the security officers' representative, concluding that, although faulty voter lists were used, neither the "rights of the voters" nor "the laboratory conditions required for a fair and free election" were disrupted. Further, the Regional Director rejected as speculative Spectrum's claim that some of the thirty-five voters might have changed their votes in favor of representation because they believed that Spectrum intentionally left them off the voter lists.

Spectrum sought review of the Regional Director's decision, but the Board denied its request, concluding that there were "no substantial issues warranting review."

In July 2016, the Union filed a charge (later amended) that Spectrum refused to bargain with it in good faith, and a complaint issued. Spectrum admitted that it refused to recognize and bargain with the Union but contested the underlying certification of the Union. General Counsel filed a motion for summary judgment, and the case was transferred to the Board.

In November 2016, the Board issued a decision and order granting the motion for summary judgment, concluding that Spectrum had engaged in unfair labor practices by failing and refusing to recognize and bargain with the Union in violation of § 8(a)(5) and (1) (29 U.S.C. § 158(a)(5) & (1)) of the Act. The Board ordered Spectrum to cease and desist from refusing to bargain with the Union.

The Board petitions for enforcement of its order. Spectrum cross-petitions for review, arguing that "laboratory conditions" were not present during the election and that this court should require the Board to hold a new election.

Although direct judicial review of the Board certification in representation proceedings is unavailable, an employer who refuses to bargain with an elected union, as Spectrum did here, may challenge the ensuing unfair labor practice decision. *See Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409-10 (1940); *NLRB v. Precision Indoor Comfort Inc.*, 456 F.3d 636, 638 (6th Cir. 2006); *NLRB v. V & S Schuler Eng'g, Inc.*, 309 F.3d 362, 366-67 n.5 (6th Cir. 2002).

Because "Congress has given the Board a broad range of discretion in supervising representation elections and establishing their procedures," this court "is limited to determining whether the Board abused that discretion and whether the Board's findings are reasonable." *V & S Schuler Eng'g, Inc.*, 309 F.3d at 367. The Board abuses its discretion when its orders lack a "reasonable basis in law," meaning that "either . . . the proper legal standard was not applied or . . . the Board applied the correct standard but failed to give the plain language of the standard its ordinary meaning." *Id.* (quoting *Pannier Corp., Graphics Div. v. NLRB*, 120 F.3d 603, 606 (6th Cir. 1997)). The Board's factual findings and application of law to the facts are reviewed under the substantial evidence standard, which requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 367, 371-72 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

On appeal, the gravamen of Spectrum's argument is that the Board's omission of thirty-five employees from the voter lists and the challenged-vote procedure that followed disrupted the "laboratory conditions" of the election.

In order to ensure that employees are exercising a free choice, the Board strives for "laboratory conditions" in representation elections by maintaining "an atmosphere in which employees are free from pressure, coercion and undue influence from either the employer or the union." *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490, 494 (6th Cir. 2000) (quoting *NLRB v. Tenn. Packers, Inc.*, 379 F.2d 172, 180 (6th Cir. 1967)). However, "such conditions are rare, 'and elections are not automatically voided whenever they fall short of perfection.'" *NLRB v.*

Dickinson Press, Inc., 153 F.3d 282, 284 (6th Cir. 1998) (quoting *NLRB v. Duriron Co.*, 978 F.2d 254, 256 (6th Cir. 1992)).

Rather, "[a] party seeking to overturn the results of a representation election bears 'the burden of showing that the election was not conducted fairly.'" *Contech Div., SPX Corp. v. NLRB*, 164 F.3d 297, 305 (6th Cir. 1998) (quoting *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988)). "In order to satisfy its burden, the objecting party must demonstrate that 'unlawful conduct occurred which interfered with employees' exercise of free choice to such an extent that it materially affected the result of the election.'" *Id.* (quoting *NLRB v. Shrader's, Inc.*, 928 F.2d 194, 196 (6th Cir. 1991)).

We conclude that Spectrum's argument fails because it is entirely speculative. Spectrum has offered no evidence that any of the thirty-five employees blamed it for being left off of the voter lists, perceived this omission as an intentional "snub" by Spectrum, and changed their votes to favor representation as a consequence. Accordingly, it has failed to meet its burden of proving that the Board's use of faulty lists interfered with the voters' free choice and materially affected the election results. *See NLRB v. Oesterlen Servs. for Youth, Inc.*, 649 F.2d 399, 400 (6th Cir. 1981) (rejecting employer's unsupported argument that employees may not have voted because the Board's agent left the polling area for ten minutes); *see also Durham Sch. Servs., LP v. NLRB*, 821 F.3d 52, 61 (D.C. Cir. 2016) (holding speculative assertions of harm are insufficient to overturn an election).

Spectrum attempts to justify its lack of evidence by arguing that the Board's own rules practically prevent it from obtaining evidence in support of its argument. It points to various Board decisions recognizing that employees fear reprisal when questioned by their employer about how they voted. However, this court has endorsed the view that "an employer has the right to interview employees in order to discover facts relevant to the issues raised in an unfair labor practices complaint" as long as certain safeguards are followed. *See ITT Auto. v. NLRB*, 188 F.3d 375, 389 (6th Cir. 1999). That Spectrum decided not to pursue this mechanism does not excuse its failure to support its claim with evidence.

Additionally, Spectrum argues that the Board's rejection of its argument is itself based on "unfounded assumptions." Essentially, Spectrum believes that the Board should have to disprove its contention that some employees may have voted in favor of the Union because they believed that Spectrum left them off of voter lists. However, it is Spectrum's burden to prove that the election was unfair, not the Board's burden to prove that it was fair. *See Contech*, 164 F.3d at 305.

Accordingly, because the Board did not abuse its discretion, we **GRANT** the Board's petition for enforcement of its order. We **DENY** Spectrum's cross-petition for review.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk